

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN F. CROSSEN and DEPARTMENT OF JUSTICE, ALLENWOOD
FEDERAL CORRECTIONAL INSTITUTE, White Deer, PA

*Docket No. 00-2812; Submitted on the Record;
Issued October 17, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of the employee's benefits effective August 2, 1999.

On December 18, 1997 appellant, then a 30-year-old correctional officer, sustained an lower back strain when lifting and carrying a chaplain who had fainted. Appellant stopped work immediately and was released to light duty on February 1, 1998, however, the employing establishment could not accommodate the light-duty restrictions, therefore, appellant did not return. The Office accepted appellant's claim for lumbar sprain. Appellant was paid appropriate compensation.

Appellant submitted two attending physicians reports from Dr. Mark Capriolo, a Board-certified internist, dated December 19, 1997 and March 13, 1998. The attending physicians report dated December 19, 1997, indicated that appellant injured his back while lifting an unconscious chaplain. Dr. Capriolo diagnosed appellant with a low back strain. He indicated that appellant had a history of low back strain. Dr. Capriolo further indicated that appellant was totally disabled from December 19, 1996 to January 5, 1997 and partially disabled from January 5 to 19, 1997 and could return to work with restrictions of no lifting greater than 10 pounds and no bending or twisting. The report dated March 13, 1998, diagnosed appellant with low back pain -- radicular. He noted that appellant had back surgery in the military in 1987 to remove a pilonidal cyst. Dr. Capriolo noted that appellant was partially disabled and recommended no inmate contact.

Appellant continued submitting reports from Dr. Capriolo, Dr. E. Milton Witthoff, an internist and Dr. David E. Machmer, a chiropractor. A magnetic resonance imaging (MRI) scan dated February 23, 1998, revealed a posterior herniation at L5-S1; suspect irritation of the right S1 nerve root secondary to the disc herniation; with right L5 foraminal stenosis. An attending physicians report prepared by Dr. Capriolo, dated May 6, 1998 indicated a diagnosis of radicular low back pain at L5-S1. He indicated that appellant had back pain prior to December 18, 1997 but noted that was typical mechanical, musculoskeletal low back pain. Dr. Capriolo indicated

that the injury on December 19, 1997 was clearly different clinically and this conclusion was verified by the MRI scan. He further noted that as a result of the herniated disc appellant may be at increased risk for future flare-ups of low back pain. Dr. Capriolo noted that appellant could continue work on February 1, 1998 with no inmate contact. The medical report from Dr. Witthoff indicated that appellant was transferred to his care after Dr. Capriolo was no longer practicing in the area. He noted that appellant's functional ability prevented him from having any inmate contact. Dr. Machmer's report indicated a diagnosis of posterior disc bulge in the L5-S1 region and sUBLUXATION of the L5 vertebrae and sacrum, however, he did not reference an x-ray for this diagnosis. Dr. Witthoff noted that the disc bulge was touching the right S1 nerve root causing pain and weakness in the right leg and foot.¹

On March 4, 1999 the Office referred appellant for a second opinion to Dr. Joseph Sgarlat, a Board-certified orthopedist. The Office provided Dr. Sgarlat with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated March 29, 1999, Dr. Sgarlat indicated that he reviewed the records provided to him and performed a physical examination of the appellant. Dr. Sgarlat noted that upon physical examination appellant's legs were normal except for subjective complaints of numbness from above the ankle down to the foot; there was normal range of motion in the hips, knees and ankles; the patellar and Achilles tendon reflexes were reduced but equal on both sides; straight leg raises were normal; no atrophy of the calf muscles; there was no footdrop with normal dorsiflexion of the toes and ankles; the spinal curves were normal; there was good range of motion; appellant was able to bend forward 90 degrees, backward 15 degrees and 25 degrees to each side; with no muscle spasm in his back and no tenderness. He reviewed the radiographic evidence, which noted a posterior disc herniation at L5 -S1 with suspected irritation of the S1 nerve root and right L5 foraminal stenosis. Dr. Sgarlat noted that appellant was able to perform a moderate degree of physical activity but became more symptomatic with sudden, heavy strains on his back. He noted that appellant was starting a new job in the near future as a football coach at the local high school.

In a letter dated April 12, 1999, the Office requested that Dr. Sgarlat clarify his opinion with regard to appellant's condition and its relation to the work-related injury of December 18, 1997. The Office also requested him to address whether appellant had residuals of the work-related injury of December 1997.

In a supplemental report dated April 14, 1999, Dr. Sgarlat diagnosed appellant with degenerative disc disease at multiple levels in the lower lumbar spine producing irritation of the right S1 nerve root and also narrowing of the intervertebral foramen. He noted that "this diagnosis is not related to the December 1997 injury. It is gradually developing condition most closely related to the aging process." Dr. Sgarlat further noted that the injury of December 18, 1997 produced a temporary aggravation of the preexisting degenerative changes. The aggravation would normally subside in a matter of some three or four weeks. He noted that there

¹ Appellant submitted medical records, which indicated on February 13, 1997 that he sustained a fall at work and injured his mid to upper back. He noted that he was unable to work or lift weights as a result of this injury.

were no residuals of the work-related injury. Dr. Sgarlat concluded appellant could return to his previous job as a corrections officer.²

On June 22, 1999 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Sgarlat's March 29, 1999 report established no continuing disability as a result of the December 18, 1997 employment injury. The Office provided 30 days in which the appellant could respond to this notice.

In a letter dated July 22, 1999, appellant's attorney indicated that appellant continued to suffer residual disability as a result of his work-related injury of December 18, 1997. He further contended that appellant's herniated disc at L5-S1 was directly related to his work injury and appellant had not fully recovered and could not return to his former position as a corrections officer. In support of his position appellant submitted reports from Dr. Angela N. Haas, Board-certified in family practice, dated July 12 and 22, 1999 and Dr. Machmer dated July 12, 1999. Dr. Haas' report dated July 12, 1999, noted a history of appellant's injury. She indicated that appellant was a power lifter and prior to this injury he was lifting 800 pounds and that post injury he could lift more than 400 pounds but could not squat because of the right leg. Dr. Haas indicated an essentially normal physical examination except decreased sensation in the L5-S1 dermatome of the right foot. The July 22, 1999 report noted a history of appellant's injury in December 1997. She also noted in June 1997 that appellant slipped and fell backwards onto to stairs and injured his mid back area. Dr. Haas noted that this injury resolved. She indicated that the injury of December 18, 1997 resulted in the herniation as revealed on the February 1998 MRI scan. Dr. Haas noted that prior to this time appellant was able to perform activities of daily living as well as power lift 800 pounds, however, after the December 1997 injury appellant had right leg numbness and foot drop, which implied the symptoms of his back and leg were temporarily related to his injury of December 1997. She noted that appellant continued to suffer residuals of numbness and pain in his back and right leg and foot. Dr. Haas did not believe that appellant could fulfill the job duties of a correctional officer as he was unable to restrain an inmate in an incident after his injury of December 1997.

Dr. Machmer's report dated July 12, 1999, noted a history of appellant's injury on December 18, 1997. He noted that appellant's injury was unpredictable with sudden onsets of severe symptoms, which made him unable to perform as a corrections officer with inmate contact. Dr. Machmer further noted that appellant's injury was the result of his December 18, 1997 work incident. He indicated that the MRI scan dated February 23, 1998 revealed a posterior disc herniation at L5-S1. Dr. Machmer noted that appellant continued to suffer from right foot numbness and occasional low back and leg pain, but could perform moderate physical activity.

By decision dated August 2, 1999, the Office terminated all appellant's benefits effective the August 2, 1999 on the grounds the weight of the medical evidence established that appellant had no continuing disability resulting from his December 18, 1997 employment injury.

² After appellant's claim was accepted for a lumbar sprain appellant sent a letter dated June 14, 1999, requesting an oral hearing, however, the claim was not in posture for a hearing at this time because the Office had not issued a decision. *See* 5 U.S.C. § 8124(b), which contemplates that first an Office decision must be issued before a hearing request will be granted.

By letter dated August 9, 1999, appellant's attorney requested a hearing before an Office hearing representative. He submitted a report from Dr. Joseph V. Conroy, a Board-certified neurosurgeon, dated August 4, 1999. Dr. Conroy noted a history of appellant's injury on December 18, 1997 and also noted another work-related injury in January 1997 when appellant's leg gave out and he fell onto a table. He indicated that upon physical examination a decreased range of motion of the lumbar spine with para lumbar spasm. Dr. Conroy indicated that "there is no reason to suspect that there was any injury prior to this incident." He noted that the injury of December 1997 caused the L5-S1 disc herniation and subsequent pain syndrome. Dr. Conroy recommended a repeat MRI scan and electromyogram studies.³

In a decision dated March 6, 2000, the hearing representative affirmed the decision of the Office dated August 2, 1999, on the grounds that the appellant had no continuing work-related disability on or after August 2, 1999.

By letter dated May 18, 2000, appellant's attorney requested reconsideration of the hearing representative's decision dated March 6, 2000. He submitted additional medical evidence from Dr. Brian A. Batman, a Board-certified orthopedic surgeon, dated March 29, 2000, Dr. Haas dated April 30, 2000 and a previously submitted attending physicians report prepared by Dr. Capriolo dated May 6, 1998. Dr. Batman indicated a history of appellant's injury of December 18, 1997 and noted that appellant had experienced recurrent bouts of back pain and radicular pain radiating down his leg since that time. He indicated that appellant sustained the back injury and herniated disc at the L5-S1 level as a direct result of the accident on December 18, 1997. Dr. Batman indicated that appellant would be a candidate for a laminectomy and discectomy at L5-S1 level. Dr. Haas' report dated April 30, 2000, again noted a history of appellant's injury on December 18, 1997 and noted appellant sustained a previous back injury in June 1997 when he slipped and fell backwards onto stairs and bruised his mid-back area. She indicated that appellant's June 1997 injury resolved and noted that appellant's weakness and numbness of the right leg was not an issue until December 1997. Dr. Haas noted that prior to December 1997 appellant was in excellent physical shape and power lifted up to 800 pounds. She noted that appellant returned to work for a short period in 1998, however, he was unable to perform his duties.

In a decision dated August 15, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant modification of the prior decision.

The Board finds that the Office has not met its burden of proof to terminate benefits effective August 2, 1999.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation

³ In a letter dated February 4, 2000, appellant's attorney withdrew his request for a hearing and indicated that appellant desired a review of the written record.

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

without establishing that the disability has ceased or that it is no longer related to the employment.⁵

In this case, the Office accepted that appellant sustained a lumbar sprain on December 18, 1997 and paid appropriate compensation thereafter. The Office terminated appellant's compensation effective August 2, 1999 based on Dr. Sgarlat's examination and report. The Board finds that there is a conflict in medical opinion between Dr. Sgarlat, the Office referral physician and Drs. Haas, Conroy and Batman, appellant's treating physicians, all of whom are Board-certified specialist in their respective fields.

Dr. Sgarlat opined that appellant suffered no residuals of the work-related injury and that his condition was related to the aging process and that he could return to work. Dr. Sgarlat indicated that appellant was fully recovered from his employment-related injury and was capable of returning to his preinjury employment. By contrast, Drs. Haas, Conroy and Batman diagnosed appellant with a work-related disc herniation at L5-S1 and continually concluded that appellant was totally and permanently disabled. Dr. Haas has consistently supported permanent work-related disability related to appellant's back condition, while Dr. Sgarlat found that appellant has no work-related residuals of the accepted injury and that he is capable of resuming his preinjury employment.

Section 8123 of the Federal Employees' Compensation Act⁶ provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁷ The Board finds that because the Office relied on Dr. Sgarlat's opinion to terminate appellant's compensation without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating compensation on the grounds that disability had ceased.⁸

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ 5 U.S.C. § 8123(a).

⁷ *Shirley L. Steib*, 46 ECAB 39 (1994).

⁸ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved.).

The August 15 and March 2, 2000 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
October 17, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Member